

**FIFTH AMENDMENT TO CONCESSION AGREEMENT BETWEEN THE
CITY OF SAN JOSE
AND
HOST INTERNATIONAL, INC.**

This Fifth Amendment to Concession Agreement is made and entered into this _____ day of _____ 2009, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City") and HOST INTERNATIONAL, INC., a Delaware corporation ("Concessionaire").

RECITALS

WHEREAS, on January 29, 1999, City and Concessionaire entered into that certain Concession Agreement ("Agreement") under which Concessionaire was granted exclusive rights to conduct food and beverage service operations in certain public locations at the Norman Y. Mineta San José International Airport ("Airport"); and

WHEREAS, on June 29, 1999, City and Concessionaire entered into a First Amendment to the Agreement to, among other things, temporarily abate a portion of the Minimum Annual Guarantee ("MAG") as described in the Agreement; and

WHEREAS, on October 15, 1999, City and Concessionaire entered into a Second Amendment to the Agreement to, among other things, provide for reimbursement of Concessionaire by City for the cost of certain additional utility connections to the Concession Areas in order to support its Concession Operations at the Airport; and

WHEREAS, on June 25, 2002, City and Concessionaire entered into a Third Amendment to the Agreement, to, among other things, provide for reimbursement of Concessionaire by City for certain construction costs attributable to the correction of structural defects and construction of various upgrades in the Concession Area and to add two new sub-Concession areas to Concessionaire's operations for the Interim Federal Inspection Service facility ("Interim FIS Facility"); and

WHEREAS, as of January 15, 2004, pursuant to Section 4.5 of the Agreement, the San José International Gateway Lounge was removed by the City in order to accommodate changes associated with the construction of the North Concourse, and also pursuant to Section 4.5 of the Agreement, City paid Concessionaire One Hundred Twelve Thousand Five Hundred Seventy Dollars and Fourteen Cents (\$112,570.14) for the improvements and equipment associated with the San José International Gateway Lounge in the Interim FIS Facility, which represents full payment for all improvements and equipment associated with the San José International Gateway Lounge; and

WHEREAS, on April 19, 2004, pursuant to Section 4.5 and Subsection 22.5.1 of the Agreement, City paid Concessionaire Ninety-Six Thousand Five Hundred Sixty-Four Dollars and Twenty-Five Cents (\$96,564.25) for all improvements and equipment related to Togo's restaurant space, which represents the entire amount owed to Concessionaire for that specific concession; and

WHEREAS, on May 10, 2006, City and Concessionaire entered into a Fourth Amendment to the Agreement to, among other things, add a new Concession Area for a new Food/Bar Concept, to provide that a portion of the mid-term refurbishment monies could be used to add new concepts, and to reimburse Concessionaire for the costs of certain improvements constructed by Concessionaire; and

WHEREAS, City and Concessionaire desire to further amend the amended Agreement, to, among other things, extend the term of this Agreement, revise Contraction and Expansion language and the Concession Areas, and amend the Concession Fee; and

WHEREAS, City and Concessionaire intend that the Agreement will remain in effect until the earlier of June 30, 2011 or the decommissioning of Terminal C.

NOW, THEREFORE, the parties agree to further amend the amended Agreement as follows:

Section 1 **SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS"** Subsection entitled "**Concession Area**" is amended to read as follows:

"**Concession Area**" (**Section 3 – Authorized Activities**) means the areas in Terminal A, Terminal A Addition, and Terminal C designated as food and beverage locations on **REVISED EXHIBIT A.**"

Section 2 Effective July 1, 2009, **SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS"** Subsection entitled "**Concession Fee**" is amended to read as follows:

"**Concession Fee**" (**Section 6.1**): Concessionaire shall pay a Percentage Fee 8% of Gross Revenues on branded food and beverage (excluding alcohol); 12% of Gross Revenues on generic food and beverage (excluding alcohol); and 18% of Gross Revenues on alcohol."

Section 3 **SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS"** Subsection entitled "**Concession Improvements**" is amended to read as follows:

“Concession Improvements” (Section 22 – Alterations and Improvements) means: those fixtures and other permanent improvements set forth in Concessionaire’s Proposal, which Concessionaire is permitted to construct in, on or about the Concession Area, subject to the requirements of this Agreement and such other fixtures and other improvements authorized by Director in writing; including those fixtures and other permanent improvements which Concessionaire is authorized to construct in the pre-security area of Terminal C near Baggage Claim, for the purposes of constructing and operating a Food/Beverage Concept (Grab and Go), to be located as designated in **REVISED EXHIBIT A-10.**

Section 4 SECTION 1 - “SUMMARY OF TERMS AND DEFINITIONS” Subsection entitled **“Expiration Date”** is amended to read as follows:

“Expiration Date” (Section 2.1 Term): the earlier of (i) June 30, 2011; or (ii) thirty (30) days after written notice of termination is provided by City, subject to earlier termination as provided in this Agreement.

Section 5 SECTION 1 - “SUMMARY OF TERMS AND DEFINITIONS” Subsection entitled **“Term”** is amended to read as follows:

“Term” (Section 2.1): commences on the Effective Date and shall continue until the Expiration Date, unless sooner terminated in accordance with the terms of this Agreement.”

Section 6 SECTION 2 – “TERM OF AGREEMENT” Subsection 2.1 **“Term”** is amended to read as follows:

“2.1 Term. This Agreement shall be binding on both parties from the Effective Date set forth in the Summary. The term of this Agreement shall commence on the Effective Date and shall continue until the Expiration Date, unless sooner terminated in accordance with the terms of this Agreement.”

Section 7 SECTION 4 – “RESTRICTIONS ON ACTIVITIES” Subsection 4.5 **“Relocation, Contraction or Expansion of Operations”** is amended to read as follows:

“4.5 Relocation, Contraction or Expansion of Operations. In the event that implementation of the City’s requirements for the Airport necessitates the relocation, expansion, or contraction of the Concession Area, or any part thereof, Concessionaire shall relocate all or part of its operations or the Concession Area, or any part thereof, or contract or expand the size of the Concession Area in an expeditious manner only as may be permitted, directed or required by the Director.

In the event that City's requirements for the Airport necessitate contraction or expansion of the Concession Area, Director shall determine whether City or Concessionaire shall be responsible for the physical removal of Concession Improvements and/or Equipment. Director shall notify Concessionaire, with advance notice, when such obligation has been assigned to Concessionaire. The party responsible for physical removal of Concession Improvements and/or Equipment shall bear the cost for the removal.

In the event that City requires Concessionaire to relocate all or part of the Concession Premises, City shall reimburse Concessionaire for Concessionaire's reasonable relocation costs as calculated in accordance with this Section ("Relocation Reimbursement"). In the event of a relocation of the entire Concession Premises, the Relocation Reimbursement will be reduced by the minimum mid-term refurbishment amount, which Concessionaire would have otherwise been required to pay under Subsection 22.4 of this Agreement. In the event of a relocation of only part of the Concession Premises, the Relocation Reimbursement will be reduced by that portion of the minimum mid-term refurbishment amount that Concessionaire would have otherwise paid for the vacated portion of the Concession Premises. The following shall be considered guidelines for calculating the Relocation Reimbursement:

Concessionaire's Allowable Improvement Costs for the Concession Improvements shall be depreciated by Concessionaire (and all subconcessionaires) on a straight line basis over a ten (10) year period from the Commencement Date, as defined in the Agreement. If Concessionaire is relocated solely at City's request and not due in whole or in part to any act or omission of Concessionaire, Concessionaire may elect to receive reimbursement for the costs of reasonable, comparable fixed improvements installed by it at its new premises, less depreciation for the balance of the term of the Agreement. If Concessionaire does not elect to receive such reimbursement, City agrees to pay Concessionaire for the unamortized portion of Concessionaire's Allowable Improvement Costs (calculated as of the time that Concessionaire is required to vacate the Concession Premises)

City shall reimburse Concessionaire for the unamortized net book value of the Concession Improvements, based upon a ten (10) year straight line depreciation, with no residual value, provided the Concessionaire has obtained all necessary written approvals for their construction, and also provided the Concessionaire has reported each improvement, its costs, and the date upon which its depreciation began, and also provided that architectural and design fees do not exceed ten percent (10%) of the costs of the improvement and all said costs are properly supported and made available for audit. All said costs must be direct costs paid by Concessionaire to independent contractors and suppliers for work actually performed on said premises, materials furnished or professional services rendered. Costs associated with Concessionaire's employees shall not be included in the calculation of these costs. To become

reimbursable, the Concessionaire shall, at its own expense provide City with 'as-built' drawings and paid invoices, showing material and labor costs involved in the construction of the approved structural improvement within ninety (90) days of the date that the improvement was placed in service. The ten (10) year straight line depreciation shall be calculated to begin from the Commencement Date, as defined in the Agreement; however, all of Concessionaire's Allowable Improvements shall be fully amortized as of June 30, 2009, and City shall not be responsible for any unamortized costs after this date.

If the Director determines that the removal of Concessionaire's Property from the existing premises and its installation at Concessionaire's new premises is possible and not unreasonably burdensome to Concessionaire, Concessionaire shall be entitled to reimbursement only for the costs of relocation of such Property.

Concessionaire agrees to bear, at its sole cost and expense, the costs of relocation of any portion of the Concession Area that is not requested by Director or that is necessitated by Concessionaire's operations, and that is approved in writing, by the Director.

The relocation, expansion, or contraction of the Concession Area conducted pursuant to this Section, or the relocation of any airlines or any airlines' gate shall not affect Concessionaire's obligation to pay the Concession Fee.

Amendments to this Agreement which change or modify the description of the Concession Area as set forth in **REVISED EXHIBIT A** to specify in writing increases, decreases, or relocation of the Concession Area at the Airport may be executed on behalf of the City by the Director."

Section 8 Effective July 1, 2009, **SECTION 6 – "FEES & DEPOSITS"** is amended to read as follows:

"6.1 Concession Fee. Commencing upon execution of this Agreement by City, Concessionaire agrees to pay to City a monthly Concession Fee, as defined herein. The Concession Fee is an amount equal to the amount set forth in the Summary as the Concession Fee, for each month during the term of this Agreement.

6.1.1 Monthly Fee.

6.1.1.1 Concession Fee Calculation. Commencing on July 1, 2009, Concessionaire shall pay to the City on a monthly basis the Percentage Fee, as set forth under the definition of Concession Fee in **SECTION 1 – "SUMMARY OF TERMS AND DEFINITIONS."**

6.1.1.2 Payment of Concession Fee. No later than twenty (20) days after the end of each month, Concessionaire shall pay to City the Concession Fee for the preceding month.

6.1.1.3 Monthly Concession Report. No later than twenty (20) days after the end of each month, Concessionaire shall deliver to the City a Concession Report for the preceding month's activity, even if no money is due.

If the monthly Concession Report is not provided on or before the twentieth (20th) day of each month as required herein, Concessionaire shall pay for administrative expenses incurred by City for delays and invoices a fee of Twenty-Five Dollars (\$25.00) per day for each day that the report is late until such date as the monthly Concession Report is submitted to the Director. This fee is established by City Council Resolution and may be adjusted from time to time in accordance with City Council Resolution.

6.1.1.4 Concessionaire shall be required to pay a late payment fee equal to one percent (1%) per month of the amount that is late, calculated monthly, for each month that payment is not timely received by City.

6.1.1.5 City assessment of the late payment shall be in addition to any other remedies City may have in law or in equity, including termination and revocation of the Concession Agreement.

6.1.1.6 Taxes and Assessments. Concessionaire shall pay, or cause the payment of, any and all other fees and charges, including, without limitation, all taxes, charges and assessments, interest payments, public agency fees and charges, insurance premiums and bond payments that are due and payable by Concessionaire under the provisions of this Agreement or under any laws.

6.2 Payment Location. The Concession Fee payable by Concessionaire shall be paid by check made payable to the "City of San José" and delivered or mailed to the following address, or to such other address as the Director may notify Concessionaire in accordance with **Section 31 - NOTICES**:

Payment Processing – Airport
Finance Department
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

6.3 Security Deposit. Concessionaire shall maintain with City a security deposit in an amount and in a form as determined by the Director and shall be payable to the "City of San José". The amount of the Security Deposit shall not exceed Five

Million Two Hundred Thirty Six Thousand Nine Hundred Thirty Four Dollars (\$5,236,934.00). The Director, in his sole discretion, may reduce such deposit requirement from time to time as the Concession Area is contracted.

The Security Deposit shall be held by City and may be applied against any unpaid fees, rates or charges due and owing to City under this Agreement. If City makes such deduction, Concessionaire shall restore the Security Deposit to the full amount required by Director, within thirty (30) days of a written demand by Director. A failure to do so shall entitle City to terminate this Agreement on thirty (30) days notice. City shall not be required to keep the Security Deposit separate from its funds, and Concessionaire shall not be entitled to interest on the Security Deposit. Any amounts remaining from the Security Deposit (after deductions for delinquent or unpaid fees, costs, or charges as specified above) at the expiration or earlier termination of this Agreement shall be returned to Concessionaire, without interest, after a determination by the Director that all amounts owed to City under this Agreement have either been paid in full or have been deducted from the Security Deposit."

Section 9 **EXHIBIT A** is replaced with **REVISED EXHIBIT A**, attached and incorporated into this Fifth Amendment.

Section 10 **EXHIBIT B** is replaced with **REVISED EXHIBIT B**, attached and incorporated into this Fifth Amendment.

Section 11 The term "Agreement" as used in the Agreement, shall refer to the Amended Agreement, as modified by the First, Second, Third, Fourth and this Fifth Amendment.

Section 12 All of the terms and conditions of the Agreement not modified by the First, Second, Third, Fourth and this Fifth Amendment shall remain in full force and effect.

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Executed on the day and year first written above.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal
corporation

SANDRA LEE
Deputy City Attorney

By: _____
LEE PRICE, MMC
City Clerk

HOST INTERNATIONAL, INC.
a Delaware corporation

By: _____

Name: _____

Title: _____

Date: _____

CORPORATE SECRETARY CERTIFICATE

This certificate shall be executed by the secretary or assistant secretary of the corporation.

I, _____ certify that I
Name of Secretary or Assistant Secretary

am the ☐ Secretary or ☐ Assistant Secretary of the corporation named in the

attached agreement; that _____
Name of Person that Signed Agreement

signed the agreement on behalf of the corporation as the _____
Title of Person that Signed the Agreement

of the corporation; and that the agreement was duly signed for and in behalf of
the corporation by authority of its Board of Directors, and is within the scope of its
corporate powers.

Signature of Secretary or Assistant Secretary

Corporate Seal

Date